STATE OF MICHIGAN
IN THE SUPREME COURT

NATIONAL WILDLIFE FEDERATION and
UPPER PENINSULA ENVIRONMENTAL COUNCIL,

Plaintiffs-Appellees,

v

CLEVELAND CLIFFS IRON COMPANY, EMPIRE IRON MINING PARTNERSHIP,

Defendants-Appellants

and

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, and RUSSELL J. HARDING, Director of the Michigan Department of Environmental Quality,

Defendants.

Supreme Court
Docket No. 121890

Court of Appeals
Docket No. 232706

Marquette Co. Circuit Court
Docket No. 00-037979-CE

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BRIEF OF AMICUS CURIAE TIP OF THE MITT WATERSHED COUNCIL

TABLE OF CONTENTS

TABLE OF AUTHORTIES

Cases

Statutes

Regulations

Other Authorities

Constitutional Provisions

COUNTER-QUESTION PRESENTED

Is Section 1701 of the Michigan Environmental Protection Act, which authorizes "any person to maintain an action for declaratory and equitable relief" to protect the air, water, and natural resources of the state consistent with the Michigan Constitution?

Defendants-Appellants Cleveland Cliffs Iron Company and Empire Iron Mining Partnership answer "no."

Defendants Michigan Department of Environmental Quality and Russell Harding answer "yes."

Plaintiffs-Appellees National Wildlife Federation and Upper Peninsula Environmental Council answer "yes."

Amici Curiae William G. Milliken et al. answer "yes."

Amicus Curiae Tip of the Mitt Watershed Council answers "yes."

STATEMENT OF BASIS OF JURISDICTION

Amicus Tip of the Mitt Watershed Council adopts the Statement of Basis of Jurisdiction as recited by Plaintiffs-Appelles, National Wildlife Federation and the Upper Peninsula Environmental Council, and the Statement of Basis of Jurisdiction as recited by the Amici Curiae William G. Milliken, et al.

STATEMENT OF FACTS

Amicus Tip of the Mitt Watershed Council adopt the Statement of Facts as recited by Plaintiffs-Appellees, National Wildlife Federation and the Upper Peninsula Environmental Council, and the Statement of Facts as recited by the Amici Curiae William G. Milliken, et al.

INTEREST OF AMICUS

Amicus Tip of the Mitt Watershed Council has been a non-profit charitable Michigan corporation in existence since 1979. It is one of the leading organizations engaged in the evaluation and protection of Michigan water and wetland resources. Over the many years of its involvement in environmental issues, it has maintained a diligent concern about the loss of wetlands and resulting negative impacts on the water quality of the lakes and streams of Michigan. In addition, it is concerned about the consistent and purposeful implementation of the Michigan Environmental Protection Act, the Natural Resources and Environmental Protection Act, and the federal Clean Water Act throughout the state of Michigan.

ARGUMENT

I. The Michigan Constitution Supports the Authority of the Legislature To Grant Broad Standing Rights as in the Michigan Environmental Protection Act.

Amicus Tip of the Mitt Watershed Council fully supports and herein adopts the arguments made by Plaintiffs-Appellees and Amici Curiae William G. Milliken et al., asserting that the Michigan Constitution allows – in fact, directs – the Legislature to provide broad standing for the people of Michigan to protect the environment and natural resources of the state, as set out in the Michigan Environmental Protection Act (MEPA). MCL 324.1701.

II. A Finding of Narrow Standing Rights under the Michigan Environmental Protection Act Would Jeopardize the Current Regulatory Framework for Environmental Protection in Michigan.

As stated above, Amicus Tip of the Mitt Watershed Council asserts that the Michigan legislature had the authority and properly exercised that authority when it provided any person in Michigan access to judicial review through MEPA of actions threatening the environment of the state. Nonetheless, Amicus believes that the Court must fully understand the importance of MEPA to the current regulatory framework for environmental protection in Michigan, and thus submits the arguments set out below.

The federal government enacted many environmental protection statutes in the 1970s, including the Clean Air Act, passed in 1970[1]; the Clean Water Act,[2] passed in 1972; and the Solid Waste Disposal Act, passed in 1976.[3] Many of these environmental statutes contain citizen suit provisions, which allow for enforcement of the statutes by non-governmental entities. The

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[1] The Act was amended in 1977 and 1990. The current provisions are found at 42 U.S.C. §§ 7401-7671q.
[2] The proper name of the statute is the Federal Water Pollution Control Act. It was amended in 1977 and 1987. The current provisions are found at 33 U.S.C. §§ 1251-1387.
[3] The Act was amended in 1978, 1980, and 1984. It governs disposal of hazardous waste. The current provisions are found at 42 U.S.C. §§ 6901-6992k.

Clean Air Act states that "any person may commence a civil action on his own behalf." 42 U.S.C. § 7604(a). The Clean Water Act states that "any citizen may commence a civil action on his own behalf." 33 U.S.C. § 1365(a). The Solid Waste Disposal Act states that "any person may commence a civil action on his own behalf." 42 U.S.C. § 6972(a). Many of these same environmental protection statutes also provide for the states to assume authority from the Environmental Protection Agency (EPA), the federal agency delegated implementation authority, to administer these federal programs within the state's jurisdiction. Michigan has assumed authority for many of these programs, of which several are discussed in more detail below.

A. The Clean Air Act

Under the Clean Air Act, states can seek authorization to implement a stationary source operating permit program, among other programs. 42 U.S.C. § 7661a.[4] Many states have assumed authority from EPA to administer this program. *See e.g.* 40 C.F.R. § 70.11. Michigan received approval to administer its program in 2001. *Id.* Michigan Department of Environmental Quality (MDEQ) administers the stationary source operating permit program for facilities in Michigan.

The Clean Air Act and its implementing regulations require that the state program must provide for judicial review of final permit action in state court. The statement from the state attorney general must assert that any person who participated in the public participation process, among others, will be able to obtain judicial review of final permit actions. 42 U.S.C. § 7661a(b)(6); 40 C.F.R. § 70.4(b)(3)(x). The U.S. Court of Appeals for the Fourth Circuit

[4] A stationary source is defined as "any source of an air pollutant except those emissions resulting directly from an internal combustion engine for transportation purposes or from a nonroad engine or nonroad vehicle" as defined elsewhere in the statute. 42 U.S.C. § 7602(z).

reviewed this provision of the Clean Air Act in *Virginia v. Browner*, 80 F 3d 869, 876-80 (CA 4,1996) *cert. den.* 519 U.S. 1090 (1992). The State of Virginia challenged the EPA's determination that its stationary source operating permit program contained inadequate judicial review provisions. *Id.* at 876. In its Notice of Proposed Disapproval of the Virginia program, the EPA stated that, at a minimum, states must allow "judicial review of permitting decisions to any person who would have standing under Article III of the United States Constitution." 59 Fed. Reg. 31183, 31184 (June 17, 1994). EPA found that Virginia's program restricted access to judicial review to those persons who could demonstrate "pecuniary and substantial" interest, and this formulation was too narrow. 80 F.3d at 676.[5] The Fourth Circuit agreed, finding that states could "grant broader standing rights than those otherwise required under federal law," but they could not define narrower standing rights and still assume authority to administer the federal program. *Id.* at 877.

The Fourth Circuit found that Virginia's formulation of pecuniary and substantial interests fell short of the Article III requirements. "A plaintiff need not show 'pecuniary' harm to have Article III standing; injury to health or to aesthetic, environmental, or recreational interests will suffice." *Id.* at 879. (citations omitted) In reviewing Virginia case law, the Fourth Circuit found that the state courts had denied standing to recreational users and riparian owners in cases where these plaintiffs would have met the requirements of Article III. *Id.* Thus, the federal courts have upheld denial of state assumption of a federal environmental protection program because the standing rights provided under state law were too narrow.

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[5] The Fourth Circuit referenced Virginia law, stating that it provided, at the time, judicial review for someone who could demonstrate that

> (i) [he] has suffered an actual, threatened, or imminent injury; (ii) such injury is an invasion of an immediate, legally protected, pecuniary and substantial interest which is concrete and particularized; (iii) such injury is fairly traceable to the [permitting decision] and not the result of the action of some third party not before the court; and (iv) such injury will likely be redressed by a favorable decision of the court."

80 F.3d at 876, citing Va. Code § 10.1-1318(B).

B. The Clean Water Act

Under the Clean Water Act, states can seek authorization to implement several programs, including the National Pollutant Discharge Elimination System (NPDES) and the Section 404 wetlands permitting programs. The MDEQ administers the NPDES program in Michigan. MCL 324.3103(2). The federal regulations governing assumption by states of the NPDES program and other water programs require that the states seeking to administer the program

> provide an opportunity for judicial review in State Court of the final approval or denial of permits by the State that is sufficient to provide for, encourage, and assist public participation in the permitting process. A State will meet this standard if State law allows an opportunity for judicial review that is the same as that available to obtain judicial review in federal court of a federally-issued NPDES permit . . . . A State will not meet this standard if it narrowly restricts the class of persons who may challenge the approval or denial of permits (for example, if only the permittee can obtain judicial review, if persons must demonstrate injury to a pecuniary interest in order to obtain judicial review, or if persons must have a property interest in close proximity to a discharge of surface waters in order to obtain judicial review.)

40 C.F.R. § 123.30. When proposing these regulations, EPA found that

> when citizens are denied the opportunity to challenge executive decisions in court, their ability to influence permitting decisions through other required elements of public participation, such as through public comments and public hearings on proposed permits, may be seriously compromised. If citizens perceive that a state is not addressing their concerns about [NPDES] permits because the citizens have no recourse to an impartial judiciary, that perception also has a chilling effect on all the remaining forms of public participation in the permitting process.

60 Fed. Reg. 14588, 14589 (March 17, 1995). Furthermore, the EPA found that requiring all interested persons access to judicial review in state court helped further EPA's policy of deferring to state implementation of NPDES programs "while ensuring that citizens will be able to influence permitting decisions through public participation and will have access to the courts to challenge State-issued permits to the same extent as if the program were federally administered." *Id.* As the Fourth Circuit phrased it in *Virginia v. Browner*, "the comment of an

ordinary citizen carries more weight if officials know that the citizen has the power to seek judicial review of any administrative decision harming him." 80 F 3d at 380.[6]

States can also assume authority to administer wetland permitting as set out in Section 404 of the Clean Water Act. 33 U.S.C. § 1344(g). Michigan was granted wetland permitting authority by EPA in 1984. 49 FR 38948 (October 2, 1984); 40 CFR § 233.70. The Attorney General's statement in support of the state's application relied upon MEPA to meet the judicial review requirements of Section 404(h). In a chart analyzing legal authority submitted as part of Michigan's application, the Attorney General asserted that "MEPA gives both a substantive standard for environmental protection and standing to any person to enforce it." Attorney General Certification, Section 404/ State of Michigan, Chart III at page 3.85 (October 26, 1983), Appendix to Amicus Tip of the Mitt Watershed Council's Brief at 4b; *see also* 49 Fed. Reg. 30948 (October 2, 1984); 40 CFR § 233.70 (b) (4). Michigan's application characterizes MEPA as analogous to the citizen suit provision of the Clean Water Act, making it central to the state's application for assumption of federal wetland permitting authority.

C. Article III Standing

The federal statutory and regulatory provisions on judicial review in authorized state environmental protection programs, while not exactly the same, aim to achieve the same goal – to ensure that the people of Michigan have the same access and right to judicial review as people

[6] In issuing its proposed rules governing judicial review requirements for state assumption of the NPDES program, the EPA stated that "[t]he courts have also recognized that meaningful and adequate public participation is an essential part of a State [NPDES]program . . .." and cited *Natural Resources Defense Council v. EPA*, 859 F.2d 156, 175-78 (D.C. Cir. 1988)(reviewing citizen intervention in state enforcement actions) and *Citizens for a Better Environment v. EPA* 596 F.2d 720, reh'g denied, 596 F.2d 725 (7th Cir. 1979)(invalidating EPA approval of state program that lacked guidelines regarding citizen participation in state enforcement actions). 60 Fed. Reg. 14588, 14589 (March 17, 1995). *See also* 61 Fed. Reg. 20772, 20773 (May 8, 1996) (notice of final rules citing *Virginia v. Browner,* 80 F3d 869 (4th Cir. 1996) for the proposition that judicial review is essential to effective public participation.

in states that have not assumed authority to implement these federal programs, people who can seek review through the citizen suit provisions of the federal statutes in federal court. The federal courts have recognized this interest in equal access to judicial review as a sufficient basis, in and of itself, for not allowing a state to administer a federal environmental protection program. The federal regulations outlining the assumption processes make clear that limiting standing will jeopardize approval of the state's program.

Access to judicial review is so highly valued because it is part of the public participation processes in these important programs that affect the air we all breathe, the water we all drink, and the land we all depend on for sustenance. Public participation, in its broadest sense, helps democratize these decisions that affect all of us, and develops confidence that the state is managing our natural resources for the benefit of all members of the public. As made clear by the Fourth Circuit and the federal regulations, access to judicial review is an essential aspect of the public participation process.

Standing under the federal citizen suit provisions is subject to the requirements of federal law and Article III of the U.S. Constitution. However, because the federal statutes and regulations on state assumption of authority to implement environmental protection programs require equal access to judicial review, federal law must set the minimum standards for the people of Michigan seeking judicial review of actions taken under these programs.

Two relatively recent U.S. Supreme Court decisions, the *Lujan* decision and the *Laidlaw* decision, frame the current standing requirements under Article III, and thus form the minimum that states must meet to assume authority to implement federal environmental protection programs. This Court is familiar with the first case, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the standing test from which was adopted in *Lee v. Macomb County Board of*

Commissioners, 464 Mich. 726, 739-40, 629 NW 2d 900, 907-908 (2001). In the *Lujan* case, the U.S. Supreme Court set out a three part test for Article III standing, requiring demonstrations of injury-in-fact, causation, and redressability. 504 U.S. at 560-61. The Court found that "the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purposes of standing." 504 U.S. at 562-3.

In the second case, the U.S. Supreme Court explained one aspect of its ruling in the *Lujan* case. The Court reviewed the citizen suit provision of the Clean Water Act in a challenge concerning an NPDES permit. *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 US 167, 180-185 (2000).[7] As stated above, the MDEQ has assumed authority to implement the NPDES permitting program in Michigan, so the subject matter of the *Laidlaw* case is directly relevant to the state's regulatory framework. The Clean Water Act provides that "any citizen may commence a civil action on his own behalf." 33 U.S.C. § 1365(a). A citizen is defined as "a person or persons having an interest that which is or may be adversely affected." 33 U.S.C. 1365(g).

The Court set out the Article III standing requirements as stated in the *Lujan* case: 1) actual or imminent, concrete and particularized injury in fact; 2) traceable to the challenged action by the defendant; and 3) likely to be redressed by a favorable decision. *Laidlaw*, 528 U.S. at 180-181, citing *Lujan*, 504 U.S. at 560-561. Regarding the first part of the test, the Court found that the relevant showing to establish standing is injury to the plaintiff, and found that the plaintiff environmental group met the injury-in-fact requirement of the Article III standing test because several members lived near or recreated on the river polluted by the defendant, and they decreased their use of the river as a result of that pollution. *Id.* at 181. One of the plaintiffs the

[7] The state of Michigan filed an amicus curiae brief supporting reversal of the appellate court decision, the course taken by the U.S. Supreme Court in its decision. 528 U.S at 171-173;

Court found to have standing stated that he would like to use the river 3 to 15 miles downstream from the facility at issue. Another lived 20 miles away from the facility and would have used the river and its surroundings for recreation were she not concerned about the pollution. Another said he had canoed 40 miles downstream from the facility. *Id.* at 181-183. The U.S. Supreme Court stated that "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Id.* at 183 (citations omitted). Viewing wildlife, canoeing, fishing, picnicking – all these activities , if impacted by a challenged activity, meet the requirements of Article III generally, and the provisions of the Clean Water Act (requiring demonstration of an interest that is or may be adversely affected) specifically. The phrase "injury to the plaintiff" as used by the Court means a negative impact on the plaintiff's interest in the resource – a river in *Laidlaw* -- at issue.

The Michigan Environmental Protection Act is the state law equivalent of the federal citizen suit provisions. In the context of the federal environmental protection programs that MDEQ now implements, MEPA is an essential part of the state's authority. The Attorney General made that connection clear several decades ago. A finding that Michigan standing requirements are narrower than Article III requirements would directly jeopardize many of the MDEQ's environmental protection programs and the permits issued under those programs, including the stationary source operating permit program, affecting over 2000 manufacturing facilities and businesses[8] whose air emissions are permitted by MDEQ each year, and the NPDES permitting program, affecting over 1500 businesses and public water treatment facilities

[8] *Michigan Guide to Air Use Permits to Install,* DEQ, June 1996 at 12 (available on MDEQ website at www.michigan.gov/deq).

whose water effluents are permitted by MDEQ[9]. In order to preserve the current regulatory framework in Michigan, MEPA must provide, at a minimum, access to judicial review at least as broad as that available to the public in federal courts as set out in the *Lujan* and *Laidlaw* decisions, and any future decisions further clarifying the requirements of Article III.

III. Conclusion

The Michigan Environmental Protection Act provides broad standing rights such that any person in Michigan can seek judicial review in order to protect the environment and natural resources of the state, as more fully set out in the briefs of the Plaintiff-Appellees and Amici Curiae William G. Milliken et al. The Michigan Constitution provides the Legislature with such power, and the Legislature properly exercised that power, particularly in the case of MEPA, which seeks to effectuate the directive in the Michigan Constitution requiring protection of natural resources. Mich. Const. 1963, art. 4, § 52.

Nonetheless, the Amicus Curiae Tip of the Mitt Watershed Council believes the Court must understand the current regulatory framework for environmental protection in Michigan and MEPA's role in that framework. Although we believe Michigan's Constitution provides the authority to confer broad standing, in order to preserve the MDEQ's authority to implement federal environmental protection programs in Michigan, the Court must find that the minimum requirements for Article III standing as set out in the U.S. Supreme Court's *Lujan* and *Laidlaw* decisions are also the minimum standards for standing in Michigan courts. For the reasons set forth above and in the briefs of Plaintiff-Appellees and Amici Curiae William G. Milliken et al., the Amicus Curiae Tip of the Mitt Watershed Council respectfully requests that the Court find

[9] See MDEQ website at www.michigan.gov/deq on the surface water page for a list of active NPDES permits.

the broad access to judicial review provided by the Michigan Environmental Protection Act is consistent with the Michigan Constitution.

TABLE OF CONTENTS

ATTORNEY GENERAL CERTIFICATION

SECTION 404/STATE OF MICHIGAN

DEPARTMENT OF ATTORNEY GENERAL

STATEMENT OF ATTORNEY GENERAL

I hereby certify, pursuant to Section 404(g)(1) of the Clean Water Act of 1977 (33 USC 466 et seq.), that the laws of the State of Michigan provide adequate legal authority to carry out the program set forth in Michigan's 404 Program submitted by Governor James Blanchard on 26th day of October, 1983. The specific authorities, which are contained in lawfully enacted or promulgated statutes or regulations in full force and effect on this date in the state are analyzed in a side-by-side comparison of U.S. Environmental Protection Agency requirements and state authorities in element three of the program entitled "Legal Analysis, Section 404/State of Michigan".

Certified on this 26th day of October, 1983, in the City of Lansing, State of Michigan.

Frank J. Kelley, Attorney General
State of Michigan

CHART III--ANALYSIS OF MICHIGAN'S LEGAL AUTHORITY TO COMPLY WITH THE REQUIREMENTS OF SECTION 404(h)(1)

FEDERAL REQUIREMENT	STATE AUTHORITY	DISCUSSION
The administrator shall determine, taking into account any comments submitted by the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, pursuant to subsection (g) of this section.		Directions to administrator, no state authority necessary.
Whether such state has the following authority with respect to the issuance of permits pursuant to such program:		
(A) To issue permits.	...a riparian owner shall obtain a permit from the department...before dredging or placing spoil or other materials on bottomland. 322.703(2) MCLA Great Lakes Submerged Lands Act Before a project which is subject to this act is undertaken, a person shall file an application and receive a permit from the department. 281.955 MCLA Inland Lakes & Streams Act Except as otherwise provided by this act or by a permit obtained from the department under sections 7 to 12, a person shall not: (a) Deposit or permit the placing of fill material in a wetland. 281.705 MCLA Wetland Protection Act	The cited state statutes quite amply demonstrate that Michigan presently possesses adequate legal authority to issue permits within the realm of Section 404. See charts I and II for a discussion of the state waters within the jurisdiction of Section 404 and the scope of the activities encompassed by that section.
which-- (i) apply, and assure compliance with, any applicable requirements of this section, including but not limited to, the guidelines established under subsection (b)(1) of this section, and sections 307 and 403 of this act.	A permit...shall not be approved unless the department determines that the issuance of a permit is in the public interest, that the permit is necessary to realize the benefit derived from the activity, and that the activity is otherwise lawful. *** In determining whether the activity is in the public interest, the benefit which reasonably may be expected to accrue from the proposal shall be balanced against the	As is apparent from the statutes cited, state agencies have comprehensive authority to condition and restrict permits so that they will be in full compliance with any applicable requirements of Section 404, or any other federal authority, for that matter. The guidelines enacted under Section 404(b)(1), found at 40 CFR 230, for example, are comprehensively embraced by existent Michigan law. Although these guidelines entail a great

FEDERAL REQUIREMENT	STATE AUTHORITY	DISCUSSION
(6) An amount appropriate to reflect any part of the noncompliance caused by factors completely beyond the violator's control (e.g. floods, fires). (d) Any state administering a program shall provide for public participation in the state enforcement process by providing either: (1) Authority which allows intervention as of right of any civil or administrative action to obtain remedies specified in paragraph (a)(1), (2), or (3) of this section by any citizen having an interest which is or may be adversely affected; or (2) Assurance that the state agency or enforcement authority will: (i) Investigate and provide written responses to all citizen complaints submitted pursuant to the procedures specified in 40 CFR 123.8(b)(4); (ii) Not oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation; and (iii) Publish notice of and provide at least 30 days for public comment on any proposed settlemnt of a state enforcement action.	"Whenever administrative, licensing or other proceedings, and judicial review thereof are available by law, the agency or the court may permit...any person...to intervene as a party on the filing of a pleading asserting that the proceeding or action for judicial review involves conduct which has, or which is likely to have, the effect of polluting, impairing or destroying the air, water or other natural resources or the public trust therein." Environmental Protection Act Section 5(1) "...any person...may maintain an action in the circuit court...for declaratory and equitable relief against the state...(or) any person...for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction." Environmental Protection Act Section 2(1)	As stated in the introductory analysis of Michigan's broad environmental protection authority, MEPA gives both a substantive standard for environmental protection and standing to any person to enforce it. Since MEPA is available, pre-settlement notice is not strictly necessary in all cases. If potential intervenors have not become involved in any earlier administrative proceedings (as allowed under MEPA), and if settlement is unsatisfactory - they may still challenge the administrative resolution as having 'the effect of polluting, impairing or destroying', since all administrative decisions must meet this MEPA standard.
40 CFR 123.92 (a) Except as specified in paragraphs (b) and (c) of this section, any discharge of dredged or fill material that may result from any of the following activities is not prohibited by or otherwise subject to regulation under this subpart;		40 CFR 123.92 deals with exemptions to the permit requirements. These are discussed and analyzed in Chart I.
40 CFR 123.93 No permit shall be issued by the state director in the following circumstances: (a) When the conditions of the permit do not comply with the requirements of CWA, or regulations and guidelines implementing CWA, including the section 404(b)(1) environmental		This regulation is surely of a procedural tone--it sets out considerations that must be undertaken by a state in ruling on individual permit applications. Such considerations are, incidentally, repeatedly and